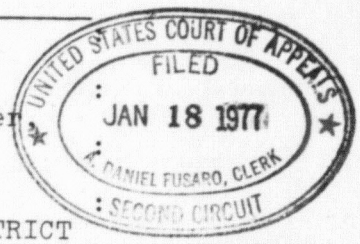
United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-3085

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT



GANNETT CO., INC.,

Petitioner,

v.

HONORABLE HAROLD P. BURKE, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF NEW YORK,

Respondent.

DOCKET NO.
76-3085

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN R. PARRINELLO, et. al.,

Defendants.

B
P/S

NOTICE OF PETITION FOR REHEARING
WITH A SUGGESTION FOR REHEARING IN BANC

Upon the annexed Petition, dated January 17, 1977, Gannett Co., Inc., by Nixon, Hargrave, Devans & Doyle, its attorneys, seeks a rehearing and suggests a rehearing in banc of the panel decision of this Court, decided January 6, 1977, denying its Petition, filed December 30, 1976, for a writ of mandamus or

a writ of prohibition directed to the United States District Court for the Western District of New York.

Dated: January 17, 1977

NIXON, HARGRAVE, DEVANS & DOYLE

By John B. McCrory
John B. McCrory
Attorneys for Petitioner
Lincoln First Tower
Rochester, New York 14603
Telephone: (716) 546-8000

TO: HON. HAROLD P. BURKE
Judge of the United States District
Court for the Western District of New York
United States Courthouse
Rochester, New York 14614

ATTORNEY GENERAL OF THE UNITED STATES
OF AMERICA
Washington, D.C. 20544

RICHARD J. ARCARA, ESQ.
United States Attorney in and for
the Western District of New York
502 United States Courthouse
Buffalo, New York 14202

LLOYD GEORGE PARRY, ESQ.
Department of Justice Attorney
Organized Crime Strike Force
921 Genesee Building
Buffalo, New York 14202

GREGORY A. BALDWIN, ESQ.
Department of Justice Attorney
Organized Crime Strike Force
100 State Street
Rochester, New York 14614

EDWARD M. SHAW, ESQ.
Attorney for John R. Parrinello
522 Fifth Avenue
New York, New York 10036

GEORGE W. CONATY, JR., ESQ.
Attorney for Michael W. Roche
260 Reynolds Arcade Building
Rochester, New York 14614

JOHN SPERANZA, ESQ.
Attorney for Daniel L. Bookless
321 Executive Office Building
Rochester, New York 14614

NEWMAN & NEWMAN, ESQ.
Attorneys for Donald R. Dileno
740 Leader Boulevard
Cleveland, Ohio 44144

ANTHONY R. PALERMO, ESQ.
Of Counsel for Donald R. Dileno
100 Reynolds Arcade Building
Rochester, New York 14614

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

GANNETT CO., INC. Petitioner, v. HONORABLE HAROLD P. BURKE, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF NEW YORK, Respondent.	:	DOCKET NO. 76-3085
UNITED STATES OF AMERICA, Plaintiff, v. JOHN R. PARRINELLO, et. al., Defendants.	:	

PETITION FOR REHEARING WITH A
SUGGESTION FOR REHEARING IN BANC

Gannett Co., Inc., petitioner herein, by Nixon, Hargrave, Devans & Doyle, its attorneys, petitions this Court for rehearing and suggests that this proceeding is appropriate for consideration by all the Judges of this Court convened in banc, and in support thereof, petitioner shows:

1. The rehearing of a matter previously before a panel of a Court of Appeals is specificially authorized by Rule 40 of the Federal Rules of Appellate Procedure and the rehearing of

cases in banc is specifically authorized by Section 46(c), Title 28, United States Code, and Rule 35 of the Federal Rules of Appellate Procedure.

2. This proceeding concerns an oral order of respondent Hon. Harold P. Burke, Judge of the United States District Court for the Western District of New York, made on or about December 8, 1976, closing and sealing to the public and the press official judicial records in three pending criminal actions (United States v. Parrinello, CR. 76-51; United States v. Bookless, CR. 75-245; United States v. Dileno, CR. 75-238). The order, made without notice and for no articulated reason, transformed significant portions of pending criminal actions into secret pre-trial proceedings in violation of the common law and constitutional public trial and free press rights of the general public and of the press, and seriously curtails substantial First Amendment press freedom.

3. On December 30, 1976, Gannett Co., Inc., petitioned this Court for a writ of mandamus or a writ of prohibition, directed to the United States District Court for the Western District of New York, requiring the unsealing and making open and available to the public and petitioner the official judicial records in the three pending criminal actions. See Exhibit 1.

4. On January 6, 1977, a majority of a panel of this Court summarily denied the Petition, without opinion. Judge Oakes emphatically dissented in a written opinion.

5. The panel determination denying the Petition completely ignores the determination of the Fourth Circuit Court of Appeals which squarely holds, in precisely the same circumstances as are involved herein, that an order closing and sealing official judicial records to the public and press is violative of the First Amendment of the Constitution of the United States. In that case, In re Washington Post Co., No. 76-1695 (4th Cir. 1976), the Fourth Circuit ordered the issuance of a writ of mandamus to the United States District Court conducting the publicity-rich trial of Maryland Governor Mandel. Its order reads:

> "On July 2, 1976, we stayed the order of the district court entered in United States v. Mandel, Criminal No. P-75-0822 which directed the Clerk to seal all papers filed after June 17, 1976. We granted leave to the government and the defendants to file responses to the applications for a writ of mandamus on or before July 12, 1976. We have now carefully considered the responses that have been filed and have concluded that the order of the district court is an unnecessary prior restraint on freedom of the press in violation of the First Amendment of the Constitution of the United States.
>
> It is accordingly ORDERED, ADJUDGED AND DECREED that the United States District Court Baltimore for the District of Maryland vacate its order entered on June 18, 1976, in No. P-75-8022 which order directed Mr. Schlitz, the Clerk of the Court, to place all subsequent filings in United States v. Mandel, under seal. The Clerk of our court will immediately issue the appropriate writ of mandamus." (Emphasis added)

6. As was stated, correctly we submit, in the dissenting opinion of Judge Oakes in this proceeding, the summary denial of the Gannett Co., Inc. Petition countenances a serious breach of First Amendment principles:

> "[O]nly a few months ago the Supreme Court made it clear, in a case involving a pretrial 'gag' order (an order that was, in some respects, of less inclusive sweep than the present one), that 'prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights' and that 'the protection against prior restraint should have particular force as applied to reporting of criminal proceeding....' Nebraska Press Association v. Stuart, 96 S.Ct. 2791, 2802, 2803 (1976). The public at large has 'a vital stake in the concept of a public trial.' People v. Hinton, 31 N.Y. 2d 71, 73, 286 N.E. 2d 265, 266, 334 N.Y.S. 2d 885, 887 (1972), cert. denied, 410 U.S. 911 (1973). '[A] secret trial can result in favor to as well as unjust prosecution of a defendant.' Lewis v. Peyton, 352 F. 2d 791, 792 (4th Cir. 1965). See also In re Oliver, 333 U.S. 257. 270-71 (1948) (Black, J.); United States ex rel. Bennett v. Rundle, 419 F. 2d 599, 606 (3d Cir. 1969) (suppression hearing must be public).
>
> "These vital considerations require that any order of cloture be made only after examination of less restrictive alternatives, Nebraska Press Association v. Stuart, supra, 96 S. Ct. at 2804-05, and on the basis of established fact, United States ex rel. Lloyd v. Vincent, supra, 520 F. 2d at 1275. The trial judge here did not meet the 'heavy burden imposed as a condition to securing a prior restraint,' Nebraska Press Association, 96 S. Ct. at 2808, and by not requiring him to do so, this court is, in my view, counten-

ancing a very serious First Amendment breach. See In re Washington Post Co., No. 76-1695 (4th Cir. July 19, 1976) (mandamus issued to lift seal of record in United States v. Mandel).

7. While it may be true that a prerogative writ will issue only in extraordinary circumstances, those circumstances are present in the instant proceeding. There are no other means by which petitioner may obtain the relief it desires, see Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943), and petitioner has shouldered the burden of showing that its right to issuance of the writ is "clear and indisputable," Banker's Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953); United States v. Duell, 172 U.S. 576, 582 (1899). Furthermore, this is not a case where issuance of a writ is in large part a matter of discretion for the Court. Compare Schlagenhauf v. Holder, 379 U.S. 104 (1964); Parr v. United States, 351 U.S. 513, 520 (1956). Rather, in this matter issuance of a writ is mandated, for the order of Judge Burke indefinitely sealed the official records in three pending criminal actions and was entirely without common law, statutory or constitutional basis. Indeed, it violated those very precepts upon which our country and its basic freedoms are founded.

8. Petitioner seeks to vindicate its right and that of the public to have open and available in this free society the judicial records of three pending criminal cases. In attempting to safe-guard these preferred human rights, petitioner has proceeded in the only manner practically possible. It brings this

action to protest the unlawful exercise of power by the District Court Judge in a significant area of constitutional rights. While it might be claimed that petitioner should have moved to vacate Judge Burke's order in the pending criminal actions, petitioner was not a party to those actions and thus had no standing to make any motion therein. Moreover, due to the exceptional importance of this matter, and due to the irreparable and substantial harm caused to petitioner and to the public by the order complained of, petitioner sought the most expeditious mode of vacatur possible. An extraordinary writ should issue in this proceeding.

9. A full and complete statement of the facts, issues and legal authority compelling this Court to grant the Petition is set forth in the Memorandum of Law in Support of the Petition for Writ of Mandamus or Writ of Prohibition to the United States District Court for the Western District of New York submitted with the Petition. See Exhibit 2.

10. On January 6, 1977, at precisely the same time that an attorney in the law firm representing petitioner was advised of the adverse panel determination herein, concidentally, another attorney in the same firm was informed by Department of Justice Attorney Gregory A. Baldwin that Edward M. Shaw, counsel for defendant John Parrinello, and he, Baldwin, would request the

United States District Court for the Western District to reopen the files in the three pending criminal actions to public view. When informed of the panel determination, Baldwin stated that it did not make any difference for he was convinced that petitioner's legal position was correct. Thereafter, both Baldwin and Shaw sent letters to Judge Burke requesting that the files be unsealed and opened to the public and the press. See Exhibits 3 and 4.

11. On January 13, 1977, inquiry by petitioner's attorneys of Mrs. Janet E. Mulley, Secretary to Judge Burke, confirmed that the Baldwin request letter had been received and that Judge Burke had ordered, on January 12, 1977, that the files of the three criminal actions were to be unsealed, and made open and available to the public and the press.

12. On January 10, 1977, Judge Burke granted a defense motion to dismiss the indictment in United States v. Dileno, CR. 75-238, based upon the decision of this Court in United States v. Brecht, 540 F.2d 45 (2d Cir. 1976).

13. As a result of these intervening events, it may now be claimed that this matter is moot. However, petitioner submits that this matter is not moot and should be reheard and considered by the entire Court in banc.

14. In addressing the mootness issue raised in Nebraska Press Assn. v. Stuart, 49 L. Ed. 2d 683 (1976), Chief Justice Burger wrote:

"Our jurisdiction under Art. III, § 2, of the Constitution extends only to actual cases and controversies. Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128, 43 L. Ed. 2d 74, 95 S. Ct. 848 (1975); Sosna v. Iowa, 419 U.S. 393, 397-403, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975). The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.' Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515, 55 L. Ed. 310, 31 S. Ct. 279 (1911).

"The controversy between the parties to this case is 'capable of repetition' in two senses. First, if Simants' conviction is reversed by the Nebraska Supreme Court and a new trial ordered, the District Court may enter another restrictive order to prevent a resurgence of prejudicial publicity before Simants' retrial. Second, the State of Nebraska is a party to this case; the Nebraska Supreme Court's decision authorized state prosecutors to seek restrictive orders in appropriate cases. The dispute between the State and the petitioners who cover events throughout the State is thus 'capable of repetition.' Yet, if we decline to address the issues in this case on grounds of mootness, the dispute will evade review, or at least considered plenary review in this Court, since these orders are by nature short-lived. See, e.g., Weinstein v. Bradford, 423 U.S. 147, 46 L. Ed. 2d 350 96 S. Ct. 347 (1975); Sosna v. Iowa, supra; Roe v. Wade, 410 U.S. 113, 125, 35 L. Ed. 147, 93 S. Ct. 705 (1973); Moore v. Ogilvie, 394 U.S. 814, 816, 23 L. Ed. 2d 1, 89 S. Ct. 1493 (1969); Carroll v. Princess Anne, 393 U.S. 175, 178-179, 21 L. Ed. 2d 325, 89 S. Ct. 347 (1968). We therefore conclude that this case is not moot, and proceed to the merits." (49 L.Ed2d at p. 690).

By applying the same considerations here, the same result obtains. Indeed, this case is even stronger because two of the pending criminal actions, Parrinello and Bookless, have not as yet reached trial, whereas in Nebraska Press Assn. the criminal defendant had already been tried and convicted. (The Parrinello action is scheduled for trial before Judge Burke on February 15, 1977). Thus, it is possible that the closure order could be renewed here. Moreover, as the dismissal in Dileno demonstrates, if this Court declines to address the issues raised here, this controversy will evade review because the orders are short-lived. On these bases alone, it must be concluded that this is a case "capable of repetition, yet evading review," and, therefore, is not moot.

15. Furthermore, it is well-established that the "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case". United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 203 (1968). See, also, Gray v. Sanders 372 U.S. 368 (1963); Vaughn V. Bower, 313 F. Supp. 37, 40 (D.C. Ariz. 1970), aff'd 400 U.S. 884 (1971). This is so because, were the rule otherwise, the perpetrator of unlawful conduct would be "free to return to his old ways." United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953). Thus it is that the stipulated agreement of the defense and the prosecution, and the subsequent revocation of the Order complained of by Judge Burke, is insufficient to defeat and render moot the substantial and important constitutional issues presented herein.

16. This proceeding concerns fundamental constitutional issues of transcendant importance that affect the very cornerstone of our Democracy - the First and Sixth Amendment rights of the public and the press. In short, the majority of the panel which reviewed the Petition by Gannett Co., Inc. overlooked and misapprehended the basic and significant constitutional issues raised therein, and the substantial and detrimental effect of their decision on the future free exercise of these basic common law and constitutional rights, both in this Circuit and throughout this Nation. It is submitted, therefore, that the Petition should be reheard, and that it is appropriate that the entire Court consider the issues raised in this proceeding.

17. If the panel decision is not now reviewed by this Court, this case will be cited in the future as authority permitting a District Court Judge to seal files in pending criminal actions without a hearing and without a written order. As such, it is in direct conflict with the unanimous decision of the Fourth Circuit Court of Appeals. Accordingly, the panel decision should not be permitted to stand.

WHEREFORE, petitioner requests that:

1. A rehearing of the Petition be granted; and

2. The Court order that the Petition be heard by the Court in banc.

Dated: January 17, 1977

NIXON, HARGRAVE, DEVANS & DOYLE

By John B. McCrory
John B. McCrory
Attorneys for petitioner
Lincoln First Tower
Rochester, New York 14603
Telephone: (716) 546-8000

CERTIFICATE OF COUNSEL

As Counsel for Gannett Co., Inc., I hereby certify that, based on my professional judgment, the foregoing Petition for rehearing with a suggestion for rehearing in banc is presented in good faith and not for delay; and, further that, because it raises constitutional questions of exceptional importance, it is wholly meritorious.

Dated: January 17, 1977

NIXON, HARGRAVE, DEVANS & DOYLE

By John B. McCrory
John B. McCrory
Attorney for petitioner
Lincoln First Tower
Rochester, New York 14603
Telephone: (716) 546-8000

UNITED STATES DEPARTMENT OF JUSTICE
ORGANIZED CRIME AND RACKETEERING SECTION
WASHINGTON, D.C. 20530
318 Federal Building
Rochester, New York 14614

Address Reply to the
Division Indicated
and Refer to Initials and Number

January 12, 1977

The Honorable Harold P. Burke
United States District Judge
100 State Street
Rochester, New York 14614

Re: United States v. Parrinello, Cr. 76-51;
United States v. Bookless, Cr. 75-245;
United States v. Dileno, Cr. 75-238

Dear Sir:

Reference my letter to you of December 2, 1976, concerning the above cases, please be advised that I withdraw my request that the District Court files in those cases be sealed, and I respectfully request that those files be reopened to public review. It is my understanding based upon personal conversations with Edward M. Shaw, attorney for John Parrinello, that he joins me in this request.

Thank you for your patience and understanding in this matter.

Very truly yours,

GREGORY A. BALDWIN
Department of Justice Attorney

cc: Edward M. Shaw, Esq.
George Conaty, Esq.
John Speranza, Esq.
Joel Newman, Esq.
Nixon, Hargrave, Devans & Doyle (Attn: John McCrory)
Richard J. Arcara, United States Attorney
Robert C. Stewart, Attorney in Charge, Buffalo Strike Force

EXHIBIT 3

EDWARD M. SHAW
ATTORNEY AT LAW
522 FIFTH AVENUE
NEW YORK, N. Y. 10036

TELEPHONE
(212) 869-8985

January 7, 1977

The Honorable Harold P. Burke
United States District Court
Western District of New York
100 State Street
Rochester, NY 14614

Re: United States v. John Parrinello
Cr. 76-51

Dear Judge Burke:

I am writing to withdraw my application of December 7, 1976, which joined in the Government's request to seal all papers in the above case and two other cases pending before Your Honor. Mr. Parrinello and I believe that the litigation which has been brought on by the Gannette Newspaper chain is unnecessary, and that Mr. Parrinello's rights can be fully protected by making an application to Your Honor with respect to any specific additional papers which the Government might file, should we feel that such an application is necessary.

Respectfully yours,

EMS:dtr

Edward M. Shaw

CC: Gregory Baldwin, Organized Crime Section
John B. McCrory, Esq.

EXHIBIT 4

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

GANNETT CO., INC.,

Petitioner,

v.

HONORABLE HAROLD P. BURKE, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF NEW YORK,

Respondent.

DOCKET NO.

76-3085

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN R. PARRINELLO, et. al.,

Defendants.

STATE OF NEW YORK:
COUNTY OF MONROE : SS:
CITY OF ROCHESTER:

FRANK H. PENSKI, being sworn, deposes and says: I am an associate with the firm of Nixon, Hargrave, Devans & Doyle, attorneys for Gannett Co., Inc., Petitioner in the above-entitled action.

On January 18, 1977, in the City of Rochester, Monroe County, New York, I personally served a copy of the following:

Notice of Petition and Petition for Rehearing with a Suggestion for Rehearing in Banc, each dated January 17, 1977, upon:

1. HON. HAROLD P. BURKE,
Judge of the United States District Court for the Western District of New York
United States Courthouse
100 State Street
Rochester, New York 14614

2. ATTORNEY GENERAL of the United States
of America
Washington, D.C. 20544

3. RICHARD J. ARCARA, ESQ.
United States Attorney in and for
the Western District of New York
502 United States Courthouse
Buffalo, New York 14202

4. LLOYD GEORGE PARRY, ESQ.
Department of Justice Attorney
Organized Crime Strike Force
921 Genesee Building
Buffalo, New York 14202

5. GREGORY A. BALDWIN, ESQ.
Department of Justice Attorney
Organized Crime Strike Force
100 State Street
Rochester, New York 14614

6. EDWARD M. SHAW, ESQ.
Attorney for John R. Parrinello
522 Fifth Avenue
New York, New York 10036

7. GEORGE W. CONATY, JR., ESQ.
Attorney for Michael W. Roche
260 Reynolds Arcade Building
Rochester, New York 14614

8. JOHN SPERANZA, ESQ.
Attorney for Daniel L. Bookless
321 Executive Office Building
Rochester, New York 14614

9. NEWMAN & NEWMAN
Attorneys for Donald R. Dileno
740 Leader Boulevard
Cleveland, Ohio 44144, and

10. ANTHONY R. PALERMO, ESQ.
of Counsel for Donald R. Dileno
100 Reynolds Arcade Building
Rochester, New York 14614

without Exhibit 1 (Motion for Leave to File Petition, and Petition for Writ of Mandamus or Writ of Prohibition Directed to the United States District Court for the Western District of New York, each dated December 29, 1976) and Exhibit 2

(Memorandum of Law in Support of the Petition for Writ of Mandamus or Writ of Prohibition to The United States District Court for the Western District of New York, dated December 29, 1976), which have been previously served upon the parties hereto, by depositing the same properly enclosed in a postpaid wrapper at the Main Branch of the United States Post Office, Rochester, New York, directed to the above-named attorneys at the address designated by each said attorney and between which places there then was and now is a regular daily communication by mail.

Frank H. Penski

FRANK H. PENSKI

Sworn to before me
this 18th day of January, 1977.

Maryann Willis

MARYANN WILLIS
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 19 77